No. 09-420

Supreme Court, U.S.
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In The Supreme Court of the United States

LINDA LEWIS, AS MOTHER AND PERSONAL REPRESENTATIVE OF THE ESTATE OF HER SON, DONALD GEORGE LEWIS,

Petitioner,

v.

CITY OF WEST PALM BEACH, FLORIDA; RAYMOND SHAW; ROBERT LEROY ROOT, III; RANDALL MAALE; THELTON LUKE; AND AUDREY DUNN, POLICE OFFICERS FOR THE CITY OF WEST PALM BEACH POLICE DEPARTMENT, IN THEIR INDIVIDUAL CAPACITIES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit's decision in *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009) on the subject of municipal liability for the failure to train police officers on the use and application of hobbles conflicts with the Tenth Circuit's opinion in *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001), and if so, does the conflict create "a deep and abiding schism" among the federal Circuits justifying a grant of certiorari to the United States Supreme Court.

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STATEMENT OF THE CASE

Petitioner Plaintiff-Appellant Linda Lewis ("Petitioner") seeks a writ of certiorari from this Court for the review of the Eleventh Circuit's March 11, 2009, decision in *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009), affirming the district court's grant of summary judgment in favor of Respondents City of West Palm Beach ("City" or "Respondent City") and its police officers Raymond Shaw, Robert Leroy Root, III, Randall Maale, Thelton Luke and Anthony Dunn, in their individual capacities[1] because she believes a conflict worthy of this Court's grant of certiorari was created by the Tenth Circuit's decision in *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001) regarding municipal liability for the failure to train police officers on the safe application of hobble restraints.

The procedural history of this case reveals that on December 11, 2006, Petitioner filed a civil rights action (amended on February 15, 2007) against City and five of its police officers[2] on behalf of the estate of her son, Donald George Lewis, as a multi-count wrongful-death complaint alleging numerous deprivations of his constitutional rights under color of state law in violation of 42 U.S.C. § 1983 and Florida

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[1] Respondent Police Officers filed a separate brief in opposition.

[2] Langley Productions, producers of the television show "COPS," and two of its employees were Defendants that were dismissed pursuant to settlements.

Statute § 768.28. Petitioner's claim against Respondent City centered on 42 U.S.C. § 1983 allegations of municipal liability for the failure to adequately train its police officers on the use and application of hobbles.

On March 18, 2008, the district court granted summary judgment in favor of City and the individual police officers and denied Petitioner's motion for summary judgment. As it relates to the municipal liability claim, the District Court specifically found that the City was not deliberately indifferent to a need for training. The District Court found that there was no notice to the City relative to a likelihood of constitutional deprivation. The District Court also found that the City did train. On April 28, 2008, Petitioner's motion under Fed. R. Civ. P. 59 (e) to alter the district court's judgment was denied.

An appeal to the Eleventh Circuit followed, wherein the appellate court in *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009), affirmed summary judgment in favor of Respondents on both claims against City. The court addressed Petitioner's claim that the City was liable under 42 U.S.C. § 1983 for its failure to provide adequate law enforcement officer training on the use of hobbles. Petitioner argued that the need for proper training on the use of hobbles and the proper placement of weight on an arrestee's back was "so obvious" that the City's failure to adequately train the officers amounted to deliberate indifference. The court rejected Petitioner's argument. The court found that the proper use of the

hobble restraint does not rise to the level of obvious probability for constitutional violations so as to create municipal liability. The court further noted that the City did provide training on the proper use of hobbles and that the City had a policy not to hogtie arrestees. Accordingly, the court found that the City was not deliberately indifferent to a potentially obvious constitutional violation. Rehearing and rehearing *en banc* were denied. Petitioner now seeks this Court's certiorari review.

REASONS FOR DENYING THE PETITION

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS BETWEEN THE TENTH AND ELEVENTH CIRCUITS ON THE ISSUE OF MUNICIPAL LIABILITY FOR FAILURE TO TRAIN

Petitioner relies on *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001) to argue that this Court should grant certiorari in this case, pursuant to Sup. Ct. R. 10 (a), to resolve a purported split between the Eleventh Circuit and the Tenth Circuit regarding municipal liability for the failure to train police officers on the safe application of hobble restraints. The opinions rendered by these two appellate courts on this issue fails to present a question worthy of certiorari, and therefore, the petition for writ of certiorari should be denied.

Rule 10 (a) of the Supreme Court provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

Sup. Ct. R. 10 (a). For purposes of Rule 10, a conflict must be a real or "intolerable" conflict on the same matter of law or fact, not merely an inconsistency in dicta or in general principles utilized. Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, Seventh Edition, page 167. Further, if resolution of an alleged "clear conflict" would have no bearing upon the ultimate outcome of the case before the Court, certiorari review should be denied. *See, e.g.*, *Sommerville v. United States*, 376 U.S. 909 (1964). These principles illustrate that this Petition fails to present the type of circuit split on an issue of national importance that warrants the United States Supreme Court's attention for compelling reasons.

All that is presented by this Petition is Petitioner's disagreement with the result achieved by the Eleventh Circuit when it applied the settled law in

that jurisdiction to the facts presented in her case. Petitioner apparently believes she would have faired better had the Tenth Circuit reasoning in *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001) been utilized to resolve her failure to train claim against Respondent City. In fact, the *Cruz* decision has no impact on the issue of municipal liability for the failure to train on the use of hobble restraints because all the Tenth Circuit held was that the denial of summary judgment was appropriate on the municipal liability question as the record presented genuine issues of material fact:

> Generally, "the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." [footnote omitted] With respect to a showing of "deliberate indifference," the district court determined that material issues of fact precluded summary judgment. The court cited evidence that the City failed to train its officers on the use of hobble restraints and that the City put such restraints in its police cars. The court also noted that high ranking officials were aware of positional asphyxia attributable to hobble restraints and of a doctor's report stating that "deaths in police custody with hog-tie restraint[s] have been reported in medical literature a number of times." The district court found that genuine issues of material fact were in dispute. The denial of summary

> judgment to the City therefore was appropriate.

Id. at 1194. Such a conclusory analysis underscores the fact that the municipal liability issue raised by Petitioner was not considered by the Tenth Circuit. *Cruz* did not articulate a clear standard for courts to follow with respect to municipal liability. Thus, no conflict can be demonstrated between the two circuits.

On the other hand, the Eleventh Circuit provided the analytical direction that was absent in *Cruz* by specifically concluding:

> "Because the City of West Palm Beach did not maintain a deliberate indifference to a potentially obvious constitutional violation and because the City provides some training on the use of hobbles, the City cannot be liable under 42 USC 1983". *Lewis v. City of West Palm Beach,* 561 F.3d 1288 (11th Cir. 2009).

The Eleventh Circuit based this conclusion on the finding that petitioner failed, as a matter of law, to establish that the City was on notice of a need to train. The Eleventh Circuit went into a detailed discussion of the elements necessary to establish deliberate indifference on the part of a municipality. The appellate court correctly pointed out that a necessary element of deliberate indifference is notice to the municipality of a problem relative to constitutional deprivations. The Eleventh Circuit pointed out that there were two ways to establish the requisite notice to the City necessary for a finding of deliberate

indifference. The first way to establish notice was to present evidence showing a pattern of constitutional violations within the specific agency. The second way to establish notice requires an activity that has such a high likelihood for constitutional violation that the need to train would be obvious. The Eleventh Circuit accurately pointed out that the Petitioner's position rests on the latter. In concluding, as a matter of law there was no notice to the City, the Eleventh Circuit found that the restraint techniques used in this case (use of hobble and positioning of the knee) did not rise to a level that would "carry a high probability for constitutional violation in the manner intended by the 'so obvious' notice that would open the door to municipal liability." *Id.*

Considering the clearly articulated reasoning of the Eleventh Circuit in *Lewis*, the *Cruz* opinion simply does not stand in obvious conflict with the Eleventh Circuit's conclusions to the extent necessary to warrant the Supreme Court's attention. The *Cruz* opinion, by and large, addresses issues relative to the qualified immunity of individual officers. The *Cruz* court comes to the very end of the opinion and dedicates one relatively short paragraph to conclude that because the trial court found that there were genuine issues of material facts in dispute, the decision to deny summary judgment to the municipality should stand. The *Cruz* court specifically opined that because the trial court cited evidence that the City failed to properly train its officers and that the City was on actual notice of a link between the use of

hobbles and positional asphyxia, that it was appropriate to deny the City's motion for summary judgment. Unlike the Eleventh Circuit's opinion, the Tenth Circuit's opinion contains no clearly articulated or in-depth discussion relative to the standard for determining the requisite notice necessary to establish deliberate indifference on the part of a municipality.

The Tenth Circuit concluded that denial of summary judgment regarding municipal liability was appropriate because genuine issues of material fact were in dispute. The Eleventh Circuit concluded that granting summary judgment regarding municipal liability was appropriate because there were no genuine issues of material fact in dispute regarding the City's training of its police officers. Nowhere in the Tenth Circuit opinion can it be read that the Tenth Circuit's articulation of the legal standard regarding municipal liability would be any different than the Eleventh Circuit's. Based on the foregoing, there is not an apparent "deep divide" between the Eleventh and Tenth Circuits and therefore no compelling reason for the Supreme Court to hear this case.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE EVEN ASSUMING PETITIONER'S CLAIM AS TRUE, THE RESPONDENT CITY WOULD STILL PREVAIL

Petitioner's claim against Respondent City before the lower courts in this case centered on her accusation that the need for training on the proper use of hobble restraints and the proper placement of weight on an arrestee's back during the restraint process is "so obvious" that it required proactive training by the City to ensure avoidance of constitutional violations. *Lewis*, 561 F.3d at 1293. The Eleventh Circuit rejected this charge, reasoning:

> In establishing this form of notice, the Supreme Court referenced the proper use of firearms and the correct use of deadly force as an area that would be so obvious as to require adequate training by the municipality to avoid liability. *City of Canton,* 489 U.S. at 390 n. 10, 109 S.Ct. 1197. In comparison, this Court refused to acknowledge the proper response to handcuff complaints as so obvious as to put the municipality on notice that training is required. *Gold,* 151 F.3d at 1352. Similarly, the application of a hobble does not rise to the level of obviousness reserved for "a narrow range of circumstances [where] a violation of federal rights may be a highly predictable consequence" of a failure to provide adequate training. *Bd. of County Comm'rs of Bryan County, Okla. v. Brown,*

520 U.S. 397, 409, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Despite the questionable use of the hobble in this particular situation, hobbles do not have the same potential flagrant risk of constitutional violations as the use of deadly firearms. Failure to provide training on hobbles is not a "particular glaring omission in a training regimen." *Id.* at 410, 117 S.Ct. 1382. Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County,* 378 F.3d 1274, 1280 (11th Cir.2004), hogtying or "fettering" under the given circumstances does not violate the Fourth Amendment. The City is therefore unlikely to be on notice of its potential legal ramifications in this context. Thus, the hobble, and the understanding of its proper application, does not carry a high probability for constitutional violations in the manner intended by the "so obvious" notice that would open the door to municipal liability.

Additionally, the City of West Palm Beach does provide training on the use of the hobble. In resolving the issue of the City's liability, "the focus must be on the adequacy of the training programs in relation to the tasks the particular officers must perform," and not merely on the training deficiencies for a particular officer. *Canton,* 489 U.S. at 390, 109 S.Ct. 1197. It is thus irrelevant what training each specific officer present at the scene was given or retained. Training Officer Gerald MacCauley testified that the City of West Palm Beach provides regular

> training on the use of force, and additionally provides specific training on the use of hobbles. The officers are also told that the proper placement of pressure or weight placed on an individual while restraining them should be on the back, near the shoulder blades, and not on the neck area. Officer MacCauley further emphasized that it is department policy not to hogtie arrestees; however it is acceptable to bring the ankles near the wrists briefly, if necessary, while attaching the hobble. While not under a specific constitutional duty under §1983, the City takes actions to ensure that arrestees are not subjected to unnecessary or painful procedures when restrained.
>
> Because the City of West Palm Beach did not maintain a deliberate indifference to a potentially obvious constitutional violation and because the City provides some training on the use of hobbles, the City cannot be held liable under 42 U.S.C. §1983.

Id. at 1293-94. Hence, even if this Court were to enunciate a new and more stringent standard relating to the notice elements of deliberate indifference, the City would still have prevailed in the courts below because the Eleventh Circuit held that the City had no notice that it had a constitutional duty to train based on the clear standards articulated in case law at the time. For this Court to now articulate a different or more stringent standard would not change the notice scenario that the Respondent faced at the time of the incident.

Additionally, the City would still prevail based on the finding in the trial court, as well as the opinion of the Eleventh Circuit, that, because "the City provides some training on the use of hobbles, the City cannot be held liable under 42 U.S.C. §1983." *Id.* It is important to note that the court in *Cruz* pointed out that the lower court found there was evidence that the police agency failed to train on the use of hobbles. In the instant case, both the district and circuit courts concluded training on the use of hobbles was provided.

Significantly, even if the court were to change the standard relating to municipal liability and establish a "per se" notice standard regarding the use of hobbles, it is important to note that Petitioner's forensic expert's opinion does not link the cause of death to hobble use. As the Petition notes, Petitioner's forensic expert has opined that "Donald Lewis' death was asphyxia due to neck compression." The *Cruz* case does not even mention "neck compression", it only addresses use of hobbles.

CONCLUSION

Petitioner has failed to establish any compelling reason for this Court to grant her Petition for Writ of Certiorari. Accordingly, because no conflict exists between the Tenth and Eleventh Circuits on the issue of municipal liability, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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